No. 86-1312

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES ROGER ABSHER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether disabled veterans who have retired from the uniformed services are denied equal protection because they are not permitted to receive both full retirement pay and full veterans disability benefits, whereas retirees under the civil service system are not required to waive a portion of their civil service annuity in order to receive veterans disability benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-5a) is reported at 805 F.2d 1025. The opinion of the Claims Court (Pet. App. 6a-15a) is reported at 9 Cl. Ct. 223.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1986. The petition for a writ of certiorari was filed on February 10, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. 3104(a)(1) (misidentified as 38 U.S.C. 3704(a)(1)) and 38 U.S.C. 3105 are reprinted at Pet. 2.

STATEMENT

1. Veterans who have served in the uniformed services for a period of twenty years or more are generally entitled to retirement pay from their respective services. See 10 U.S.C. 3911 *et seq.* (Army); 10 U.S.C. (& Supp. III) 6321 *et seq.* (Navy and Marines); 10 U.S.C. 8911 *et seq.* (Air Force); 14 U.S.C. (& Supp. III) 288-294, 14 U.S.C. (Supp. III) 353-355, 362, 421, 423-424 (Coast Guard); 33 U.S.C. (Supp. III) 853g, 33 U.S.C. 853k, 853*l*, 33 U.S.C. (& Supp. III) 853*o* (National Oceanographic and Atmospheric Administration); 42 U.S.C. (& Supp. III) 212 (Public Health Service). Retirement pay is taxed as ordinary income. Veterans with a service-related disability may also qualify for disability compensation and pensions administered by the Veterans Administration (VA). 38 U.S.C. (& Supp. III) 301 *et seq.* These VA benefits vary according to the degree of the disability, without regard to rank or length of service (38 U.S.C. (& Supp. III) 314). They are exempt from taxation (38 U.S.C. 3101; 26 U.S.C. 104(a)(4)).

Retired veterans may not, however, receive both full retirement pay and disability benefits (38 U.S.C. 3104). Such dual payments have been expressly prohibited since 1891, originally by a flat ban on retirees receiving any disability benefits at all (Act of Mar. 3, 1891, ch. 548, § 1, 26 Stat. 1082). Starting in 1944, however, Congress permitted retirees to waive an amount of retirement pay equal to the amount they are eligible to receive in disability benefits, Act of May 27, 1944, ch. 209, 58 Stat. 230 *et seq.* (currently codified at 38 U.S.C. 3105), so that retirees may receive the full benefit of the tax-exempt status of their disability benefits.

2. Petitioners are 2,048 disabled military retirees. They challenged the constitutionality of 38 U.S.C. 3104 and 3105 in the Claims Court, contending that the ban on dual compensation and its accompanying waiver requirement violate

the equal protection component of the Fifth Amendment because civil service retirees who also qualify for VA disability benefits are not required to waive a portion of their civil service annuities in order to receive the VA benefits. Petitioners sought the amount of back retirement pay they had waived during the six years preceding the filing of their complaint.

The Claims Court (Pet. App. 6a-15a) granted summary judgment for the United States. The court held that the prohibition on dual compensation in 38 U.S.C. 3104 and the waiver provision of 38 U.S.C. 3105 together serve the legitimate objectives of limiting public spending and placing a ceiling on the amount of compensation received as a result of uniformed service (Pet. App. 12a-13a). Moreover, the court held, Congress has pursued these objectives in a rational manner. The court rejected petitioners' contention that there is no rational distinction between military retirees and other federal employees who are not required to waive their annuities in order to receive VA disability benefits (*id.* at 13a-14a). Pointing to the "preferential treatment deservedly provided retirees of the uniformed services"—including the young age at which military personnel can retire and numerous "commissary, recreational, travel and health benefits in addition to their retired pay"—the court concluded that these special benefits provided "a rational basis for limiting the amount of compensation [petitioners] receive" (*ibid.*). Putting the point another way, the court held that "[t]he special benefits accorded retirees of the uniformed services are such that this class of individuals is not situated similarly to other groups that are not required to waive retirement pay to receive tax-free VA benefits" (*id.* at 14a).

The court of appeals affirmed (Pet. App. la-5a). It agreed with the Claims Court that the legislative decision to limit the compensation received by uniformed services retirees,

while permitting them to take full advantage of the tax-exempt VA disability benefits, is "the type of balance Congress is entitled to strike" (*id.* at 4a). And the court found the differences between civil service retirement and military retirement more than sufficient to explain the disparate treatment of the two groups of retirees. The court concluded that "[t]he balance [Congress] has thus struck is not only rational, it also bears a demonstrably fair and substantial relation to legitimate legislative objectives" (*id.* at 5a).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. To the contrary, it is consistent with a long line of decisions rejecting attempts to use the Equal Protection Clause to obtain greater benefits than Congress has chosen to provide under a particular program. *E.g., Bowen* v. *Owens*, No. 84-1905 (May 19, 1986); *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980); *Mathews* v. *DeCastro*, 429 U.S. 181 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Flemming* v. *Nestor*, 363 U.S. 603 (1960). No further review is warranted.

1. To establish a denial of equal protection, a plaintiff group must make a two-part showing. First, it must show disparate treatment: it must identify a similarly situated group and show that it is being treated less favorably than that group. *City of Cleburne* v. *Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985), slip op. 6; *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982). Second, it must show that there is no justification for the disparity; where, as here, no "suspect classification" or "fundamental interest" is involved, the test is whether the difference in treatment "is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97

(1979). See also *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. at 174-176; *Flemming* v. *Nestor*, 363 U.S. at 611.

2. Petitioner's showing here falls far short. The bundle of retirement benefits for uniformed service personnel evolved separately, and differs in many respects, from the bundle of benefits for civil service personnel. Military retirement benefits are tailored to Congress's perception of what is needed to attract qualified personnel, to ensure dedicated service and an orderly pattern of promotion, and to provide suitably for retirement. Cf. *Vance* v. *Bradley*, 440 U.S. at 109 ("The Foreign Service retirement system and the Civil Service retirement system are packages of benefits, requirements, and restrictions serving many different purposes."). Petitioners offer no reason whatever to conclude that military and civil service personnel must be treated identically, or that each group is constitutionally entitled to the benefit of any provision enjoyed by the other. Cf. *id.* at 98-102 (rejecting equal protection challenge to mandatory retirement age in Foreign Service).

a. The dual benefits provision cannot be viewed in isolation. The military retirement system differs in numerous respects from the civil service retirement system, offering substantial advantages to military personnel that are not enjoyed by their counterparts in the civil service. Three examples will illustrate. First, uniformed services personnel make no contribution to any retirement fund. Civil service personnel, by contrast, must make regular contributions to their retirement fund of up to 7% of their salaries. 5 U.S.C. 8334(a)(1).[1] Second, uniformed services personnel generally may retire after 20 years of service, regardless of age. 10

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[1]A disabled veteran who enters the civil service does not evade the employee-contribution requirement. If he wishes civil service retirement credit for his years of military service he usually must (a) forfeit any uniformed services retired pay to which he would otherwise be

U.S.C. 3911, 3914 (Army); 10 U.S.C. 6323, 6327 (Navy and Marines); 10 U.S.C. 8911, 8914 (Air Force); 14 U.S.C. 291, 14 U.S.C. (Supp. III) 355 (Coast Guard); 33 U.S.C. 853*l* (National Oceanographic and Atmospheric Administration); 42 U.S.C. (& Supp. III) 212(a) (Public Health Service). The average age of enlisted personnel at retirement is 42, and officers on average retire at 46 (Pet. App. 14a; Office of the Actuary, Defense Manpower Data Center, *FY 1983 Defense Statistical Report on the Military Retirement System* 91 (1984)). Civil service personnel, by contrast, must generally wait until age 62 to retire and receive benefits. 5 U.S.C. 8338(a).[2] Third, in addition to retired pay, uniformed service retirees also receive commissary, recreational, travel, and health benefits not available to civil service retirees. See, *e.g.*, Army Reg. 40-3, ¶¶ 4-11 (Feb. 15, 1985) (medical services); *id.* at 60-20, ¶¶ 2-9 (Aug. 1, 1984) (exchange privileges); *id.* at 30-19, App. B (July 1, 1980) (commissary privileges); *id.* at 215-2, ch. 2 (Mar. 6, 1984) (recreational privileges).

b. Congress, weighing the needs of the military services, established a package of retirement benefits to meet those needs. Differences between that package and the benefits afforded to other government personnel do not violate the

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entitled, 5 U.S.C. 8332(c)(2); Pub. L. No. 99-335, § 101(a), 100 Stat. 523 (to be codified at 5 U.S.C. 8411(c)(2)), and (b) make a contribution to the civil service retirement fund of either 7% or 3% for each year of military service performed after December 31, 1956, depending upon whether he is subject to the Civil Service Retirement System (5 U.S.C. 8332(c)(1)(B) and (j)(2)(A); 5 U.S.C. (& Supp. III) 8334(j); 5 C.F.R. 831.301(b)), or the new Federal Employees' Retirement System (Pub. L. No. 99-335, § 101(a), 100 Stat. 523, 536-537 (to be codified at 5 U.S.C. 8411(c)(1)(B), 8422(e))).

[2]There are, however, special provisions that permit a civil service employee with 30 years of service to retire at age 55 (5 U.S.C. 8336(a)), or with 20 years of service at age 60 (5 U.S.C. 8336(b)).

Equal Protection Clause unless "patently arbitrary or irrational." *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. at 177; see *Vance* v. *Bradley*, 440 U.S. at 96-97; *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 40 (1973); *City of Cleburne* v. *Cleburne Living Center, Inc.*, slip op. 6.

For example, in *Vance* v. *Bradley, supra*, a group of Foreign Service employees challenged a requirement that they retire at age 60 as a violation of equal protection because civil service employees are not subject to the same requirement. This Court noted that the age limit could not be struck down on this ground unless the cap was shown not to be rationally related "to the achievement of any combination of legitimate purposes." 440 U.S. at 97. The Court found that the objectives of stimulating superior performance in the Foreign Service by assuring that opportunities for promotion are available, and ensuring that Foreign Service personnel are up to the rigors of overseas duty, provide ample justification for having a mandatory retirement age in the Foreign Service.

Similarly, a retirement system for the uniformed services that requires no employee contributions and permits early retirement but does not allow dual payments clearly bears a rational relationship to the needs of the uniformed services. As this Court explained in *McCarty* v. *McCarty*, 453 U.S. 210, 212-213 (1981) (footnotes and citations omitted):

> The impetus for [the enactment of a military retirement system during the Civil War] was the need to encourage or force the retirement of officers who were not fit for wartime duty. Thus, from its inception, the military nondisability retirement system has been "as much a personnel management tool as an income maintenance method," the system was and is designed not only to provide for retired officers, but also to ensure a "young and vigorous" military force, to create

an orderly pattern of promotion, and to serve as a recruiting and re-enlistment inducement.

In keeping with these purposes, Congress has crafted a retirement program for members of the uniformed services that imposes no burden on current income and that encourages both enlistment and early retirement by permitting retirement after 20 years of service with a lifetime annuity and substantial post-retirement in-kind benefits. In this way, the needs for "a 'young and vigorous' military force [and] an orderly pattern of promotion" are served. Having crafted such a package of retirement benefits for uniformed service employees, Congress obviously could decide to save money and keep benefits at what it thought an appropriate level by denying a pro tanto portion of retirement pay to uniformed service retirees who are also receiving VA disability benefits, without at the same time denying dual benefits to civil service retirees, whose retirement fund comes in part from their own mandatory contributions and who will generally have been required to serve to a greater age. To hold otherwise would expose virtually every provision for compensation or benefits to any class of government employees—and much else besides—to judicial scrutiny for comparability to some other provision affecting some other class.

The debates on the ban on dual compensation evinced a concern with the rising cost of military pensions and a belief that dual compensation was excessive and improper. 21 Cong. Rec. 8507-8508, 8509-8522 (1890); 22 Cong. Rec. 134, 2191-2192 (1891). These were legitimate concerns then and they are legitimate concerns now, especially when viewed in light of the various special advantages of military retirement.

Congress could, of course, have provided more generously for uniformed service retirees. In just the past ten years, in fact, more than twenty bills have been introduced

to amend 38 U.S.C. 3104 and 3105, but none has been enacted. See, *e.g.*, H.R. 867, 99th Cong., lst Sess. (1985); H.R. 1366, 99th Cong., lst Sess. (1985); H.R. 325, 98th Cong., lst Sess. (1983); H.R. 468, 98th Cong., lst Sess. (1983); S. 783, 97th Cong., lst Sess. (1981); H.R. 517, 97th Cong., lst Sess. (1981); H.R. 2141, 97th Cong., lst Sess. (1981); S. 1907, 96th Cong., lst Sess. (1979); H.R. 823, 96th Cong., lst Sess. (1979); H.R. 722, 95th Cong., lst Sess. (1977). See also Pet. App. 14a-15a. As this Court said in rejecting a similar attempt to win in this Court what a group of retirees had failed to win in Congress, "[t]o be sure, [the retiree] lost a political battle in which he had a strong interest, but this is neither the first nor the last time that such a result will occur in the legislative forum." *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. at 179.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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